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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ALPHA & OMEGA SEMICONDUCTOR, LTD., a Bermuda corporation; and ALPHA & OMEGA SEMICONDUCTOR, INC., a California corporation,

Plaintiffs and Counterdefendants,

v.

FAIRCHILD SEMICONDUCTOR CORP., a Delaware corporation,

Defendant and Counterclaimant.

AND RELATED COUNTERCLAIMS.

Case No. C 07-2638 JSW
(Consolidated with Case No. C-07-2664 JSW)

[REDACTED] ALPHA & OMEGA SEMICONDUCTOR, INC. AND ALPHA & OMEGA SEMICONDUCTOR LTD.'S OPPOSITION TO FAIRCHILD'S MOTION TO COMPEL

Date: September 16, 2008
Time: 2:00 p.m.
Location: Courtroom E, 15th Floor
Judge: Hon. Elizabeth D. Laporte

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I. INTRODUCTION

It is now apparent that AOS has been sandbagged by Fairchild.

Months ago, AOS agreed to Fairchild's proposal that discovery proceed on the basis of "representative parts." According to Fairchild, its proposal would limit the burden of production for both parties. At the Court's urging, AOS agreed to this proposal and limited its discovery regarding Fairchild's products to only a limited number of purportedly representative Fairchild products. Fairchild, in contrast, has repeatedly demanded broader and broader discovery regarding all AOS low-voltage trench MOSFET products. Fairchild now moves to compel AOS to produce essentially *all* documents regarding *all* of the accused AOS products – indeed, Fairchild also wants this complete discovery regarding 56 additional AOS products that Fairchild has recently accused of infringement.

Enough is enough. AOS has endeavored so far to keep pace with Fairchild's increasing demands, led on by Fairchild's constant assertions that it needed yet another piece of information for all of AOS's parts in order to identify representative AOS parts. Indeed, Fairchild's motion seeks to compel AOS to produce many documents that AOS has already produced in response to Fairchild's incessant requests for additional information, all ostensibly needed by Fairchild so it could identify representative AOS parts.

Even putting aside the parties' representative parts agreement, Fairchild fails to carry its burden of demonstrating that the discovery it is seeking, beyond what AOS has already produced, is needed or relevant to the specific patent claims it is asserting against AOS's products. For example, Fairchild seeks documents (such as product recipes) that are duplicative of documents that AOS already has produced (product process flows). Fairchild seeks other documents (e.g., quality assurance data) that it previously did not dispute are oppressively voluminous and either irrelevant or only marginally relevant, and therefore did not need to be produced by either side.

Fairchild's motion is not brought in good faith. It should be denied.

II. BACKGROUND

A. At The Court's Urging, The Parties Agreed To Limit And Focus Discovery Based On A Representative Parts Agreement.

Last November, Fairchild proposed that discovery proceed on the basis of representative parts. *See* Doscher Decl. Ex. A (Joint Case Management Conference Statement, Docket # 28) at 6:15-16. As described by Fairchild:

> Such an agreement is typically entered into in semiconductor patent litigation as a means of reducing discovery costs and trial time. Such agreements make sense because many semiconductor products are of similar design and manufacture.

See Ex. B (Fairchild's 11/07 Motion to Compel,[1] Docket #57) at 7-8. At the time, Fairchild asserted that it was not interested in obtaining discovery on all 342 accused AOS products. *Id.* *See also* Ex. C (Fairchild's 11/07 Reply Brief,[2] Docket #105) at 2 (characterizing a representative parts agreement as a workable solution to "AOS's grumbling that it is being asked to provide discovery on too many products . . . ."); Augustine Decl. ISO Fairchild Mtn to Compel, Docket # 178 ("Augustine Decl.") Ex. 25 at 18-19 (transcript of 11/27/07 hearing) (emphasizing to the Court that a representative parts agreement was a "practical way to proceed" so that "the parties do not need to take discovery on the entire product line.").

AOS initially was reluctant to enter such an agreement because its products are not designed to share common technical features relevant to Fairchild's patents, and therefore it does not group its products according to those features. *See* Doscher Decl. Ex. D (Hebert Decl. ISO Pl.'s Reply ISO Mtn. to Strike Fairchild's Patent L.R. 3-1 Disclosures, Docket #77) ¶¶ 6-15. Rather, AOS's products are individually designed for targeted applications and thus, as AOS explained to the Court, it was not in a position to propose meaningful product groupings based on Fairchild's vague infringement theories. *Id.* *See also* Augustine Decl., Ex. 25 at 23:7-19 ("we have to understand more about their position . . . before that kind of agreement can be reached."). However, Fairchild assured AOS and the Court that it would be able to identify representative

[1] "Fairchild's 11/07 Motion to Compel" refers to Fairchild's Motion to Compel Responses to Interrogatories and Production of Documents (Docket #57, filed Nov. 6, 2007).
[2] "Fairchild's 11/07 Reply Brief" refers to Fairchild's Reply Brief in Support of Its Motion to Compel Responses to Interrogatories and Production of Documents (Docket #105, filed Nov. 27, 2007).

AOS products based on AOS's "process specs and the process flows":

> That is the best evidence that would show whether they form a deep well inside the body or not . . . . When we see their process specs and the process flows, it will be much easier to determine which of their products infringe.

See Augustine Decl. Ex. 25 (Nov. 27, 2007 Hearing Tr.), at 24:25-25:13. At the Court's urging, AOS agreed to this proposal and withdrew its pending motion to compel documents related to all of the accused Fairchild products as a result of this agreement. *See* Augustine Decl., Ex. 25 at 19:4-9, 19:25-20:4 (the Court suggests that the parties should start narrowing the case based on limited discovery); *Id.* at 22:2-5 ("you should be willing perhaps with—perhaps on a showing of some design documents . . . to withdraw those products from the case."). The parties agreed to do so on January 17, 2008, in light of progress that had been made toward negotiating a representative parts agreement. *See* Doscher Decl. Ex. E (Fairchild's Notice of Withdrawal, Docket #132) (explaining that "the parties are actively engaged in arriving at an agreement governing the use of representative parts for purposes of discovery"); Ex. F (AOS's Notice of Withdrawal, Docket #133) (explaining that "good faith negotiations towards [a representative parts] agreement have progressed to the point that the pending motions to compel can be withdrawn").

AOS has proceeded with its own discovery regarding Fairchild's products based on the parties' agreement, and has only requested production that it needs to develop its infringement theories for a limited number of representative Fairchild parts.

Fairchild, on the other hand, has used the parties' agreement as an excuse to demand ever more discovery from AOS. By December 2007, Fairchild asserted that, in order to identify representative AOS parts, it needed the process flows for *all* 342 of AOS's then accused parts:

> [P]lease identify the process used to make each of the 342 accused AOS parts identified by part number in Fairchild's PICs. This will help us determine how to proceed on the representative parts issue.

See Doscher Decl. Ex. G (12/28/07 Email from Jacobs to Wu requesting process flows and recipes for all 342 AOS products).

After AOS produced this information, Fairchild came back claiming it needed additional

information for all AOS products – including recipes, wafer epitaxial layer specifications, and computer masking files (a.k.a. "GDS files"). *See* Augustine Decl. Ex. 6 (explaining that Fairchild cannot propose groupings for AOS's products until it sees the process flows, recipes, and GDS files for *all* devices), Ex. 7 (seeking wafer epitaxial layer specifications).

AOS sought reassurance from Fairchild that Fairchild would live up to its end of the representative parts agreement. For example, before producing the GDS files requested by Fairchild for all AOS products, AOS asked Fairchild to confirm that it would work diligently and in good faith to articulate meaningful groupings for AOS's products upon receiving the files. *See* Doscher Decl. Ex. H (03/21/08 Email from Hoffman to Jacobs). Fairchild responded:

> We are already working toward the goal of identifying product groupings for AOS's products—we will of course continue to work in good faith toward that goal upon receiving AOS's remaining GDS files.

Doscher Decl. Ex. I (04/14/08 Email from Augustine to Hoffman). Based on this representation, AOS diligently gathered and produced the GDS files for all its low-voltage power MOSFETs. Fairchild made the same assurance when it requested the recipes that AOS provides to its foundries. *See* Augustine Decl., Ex. 10 ("Contrary to [AOS's assertion], Fairchild has not 'given up' on its attempt to group AOS products.").

Having obtained the benefits of limited production related to its own products, Fairchild now abandons all pretense of upholding its end of the representative parts agreement. Fairchild now asks the Court to compel AOS to produce within two weeks, in effect, every technical document in its possession.

B. <u>AOS Has And Continues To Produce Documents For Which Fairchild Has Expressed A Need.</u>

1. AOS has produced Manufacturing Documents

a. Process flows and recipes

AOS long ago produced process flows and recipes for all 342 products initially accused by Fairchild. *See, e.g.,* Doscher Decl. Ex. J (02/22/08 Letter from Wong to Augustine) (producing process flows AOS_F00014159-14638), Ex. K (03/14/08 Letter from Majidian to

Jacobs, et. al.) (producing process flows AOS_F00014741-47).

AOS has grown increasingly frustrated that it has produced all of the process flows and recipes required to describe the structure and composition of AOS's products, and yet Fairchild continues to insist on more. Therefore, AOS requested that Fairchild identify what additional information it seeks:

> Fairchild, significantly, has never complained that this information, taken together, is insufficient to describe the structure and composition of AOS's products. Moreover, in light of the information contained within AOS's process flows, AOS does not understand Fairchild's vague request for "process recipes." AOS needs further clarification before it can respond further.

See Augustine Decl. Ex. 12 (07/03/08 Letter from Hoffman to Hulse)

Fairchild purports to identify missing recipes in its motion to compel. *See* Fairchild's Mtn at 4, n. 5 ("Fairchild needs . . . trench etch, measurement, polysilicon deposition, polysilicon etching, polysilicon annealing, and ion implantation recipes).

b. GDS files

AOS also produced long ago GDS files and identifying information for all 342 products initially accused by Fairchild. *See* Doscher Decl. Ex. N (01/11/08 Letter from Hoffman to Jacobs) (producing GDS files AOS_F5000000-10), Ex. J (producing GDS files AOS_F5000011-24), Ex. K (producing GDS file list AOS_F00014740), Ex. O (04/16/08 Letter from Majidian to Augustine, et. al.) (producing design layout and mask information AOS_F00014768-9 and GDS

files AOS_F5000025-197).

c. Wafer specifications

AOS has produced wafer specifications for all 342 products initially accused by Fairchild. *See* Doscher Decl. Ex. P (07/10/08 Letter from Majidian to Jacobs, et. al.) (producing wafer database AOS_F00015362).

d. Epitaxial specifications

AOS has produced epitaxial specifications for all 342 products initially accused by Fairchild. *See id.* (producing wafer epitaxial specifications AOS_F00015359).

e. "Other documents needed to manufacture AOS's accused products"

AOS has produced the documents needed to manufacture all 342 of its initially accused products, including the process flows, recipes, GDS files, wafer specifications, and epitaxial specifications. *See* Hebert Decl. ¶¶ 9-12. Fairchild has not identified any other documents needed to manufacture AOS's accused products. Therefore, AOS does not understand Fairchild's vague demand for "other documents."

2. AOS has produced Simulation Documents

AOS produced these documents, which Fairchild dismissed as "mere *summaries* of simulations and test data." *See* Fairchild's Mtn at 5, n. 6 (emphasis in original). *See also* Hebert Decl. ¶ 14.

Fairchild first specifically identified its purported need for AOS's simulation documents on July 11, 2008. Augustine Decl. Ex. 11 at 2. Fairchild now demands the raw data files used by AOS's design tools. Fairchild's Mtn at 7-8.

. Review and production of these documents is therefore much more burdensome than for the Design Review documents that have been produced.

3. AOS has produced Device Structure Documents

AOS has produced non-privileged reverse engineering documents for its accused products including scanning electron microscope ("SEM") images and spread resistance profile ("SRP") analyses, what Fairchild calls Device Structure Documents. *See* Doscher Decl. Ex. R (08/20/08 Letter from Majidian to Jacobs, et. al.) (producing SEMs at AOS_F00133346-753), Ex. S (10/10/07 Letter from Majidian to Jacobs, et. al.) (producing, e.g., spread resistance profile ("SRP") analyses at AOS_F00001567-1584).[4]

Fairchild also seeks to compel AOS to produce quality control data that both sides initially requested but subsequently ceased requesting in light of the burden and lack of relevance. *See* Doscher Decl. Ex. T (11/15/07 Letter from A. Wu to I. Shoiket), Ex. U (08/18/2008 Letter from Doscher to Shoiket). "Inline" manufacturing quality control data measures the deviations of individual wafers from design specifications during various stages of the manufacturing process, and is oppressively voluminous—more than approximately 2.6 million pages for AOS alone. *Id.* AOS has produced samples of its "inline" manufacturing quality control data. Doscher Decl. Ex. U (producing AOS_F0017130-131). Fairchild has never contended that deviations, on an individual wafer level, are relevant to their infringement analysis.

4. AOS has produced Device Operational Documents

AOS has produced "unclamped inductive switching" ("UIS") data, "electrical breakdown current-voltage characteristics data," and "operational transistor current-voltage characteristics data."[5] *See* Doscher Decl. Ex. V (08/19/08 Letter from Majidian to Jacobs, et. al.) (producing, e.g., UIS data at AOS_F00129607-14, AOS_F00129643, AOS_F00130533, and AOS_F00133073-133091 and electrical breakdown current-voltage characteristics data at AOS_F00024777 and AOS_F00126644); Ex. Q (producing, e.g., operational transistor current-

[4] Fairchild first specifically identified its purported need for AOS's "unclamped inductive switching data," "electrical breakdown current-voltage characteristics data," and "operational transistor current-voltage characteristics data" on July 11, 2008. Augustine Decl. Ex. 11 at 2.

[5] Here and elsewhere throughout this motion, AOS points to the voluminous production of documents with the "producing, e.g." notation and one or more illustrative examples.

voltage characteristics data at AOS_F00015551).

AOS's data sheets describing the operational characteristics of its devices are, as Fairchild admits, published publicly. *See* Fairchild's Mtn at 10:5-6. Nonetheless, Fairchild now demands, and AOS has produced, data sheets including raw data underlying the graphs, charts, and plots contained in the data sheets. *Id.* *See also* Doscher Decl. Ex. V (08/19/08 Letter from Majidian to Jacobs, et. al.) (producing, e.g., datasheet for AO4803 including underlying data at AOS_F00090246-284).

5. AOS either has produced or has committed to produce documents pertaining to the 56 additional parts identified by Fairchild.

Fairchild initially accused 342 products of infringing. On May 21, 2008, Fairchild requested discovery on 56 new products that AOS was in the process of introducing to the market. To the extent AOS has produced documents for the 342 products initially accused by Fairchild, AOS has or will produce the same type of documents for the 56 new products accused by Fairchild. *See* Doscher Decl. Ex. W (Fairchild's Second Supplemental Response to AOS's First Interrogatories) at 46:15-47:3 (supplemental response dated August 13, 2008 identifying 56 new AOS accused products).

III. LEGAL STANDARD

Discovery under the Federal Rules of Civil Procedure is not without limits and must at least be "relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1). "While the standard of relevancy is a liberal one, it is not so liberal as to allow a party to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so." *In re Fontaine*, 402 F. Supp. 1219, 1221 (E.D.N.Y. 1975) (citation omitted). Indeed, the Federal Rules were amended to narrow the scope of discovery. *See* Fed. R. Civ. P. 26 (committee notes).

The burden rests on the party seeking to compel discovery to demonstrate that its requests seek information relevant to the claim or defense of any party. *See Soto v. City of Concord*, 162 F.R.D. 603, 610 (N.D. Cal. 1995) ("[I]n general the party seeking to compel discovery bears the burden of showing that his request satisfies the relevance requirement of Rule 26 . . . ."); *Ingram*

v. The Home Depot, U.S.A., Inc., No. Civ.A. 97-8060, 1999 WL 88939 at *2 (E.D. Pa. Feb. 19, 1999) ("Once the party opposing discovery raises its objection, the party seeking discovery must demonstrate the relevancy of the requested information.").

Vague and conclusory assertions of relevancy are not sufficient. *See Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1084-85 (11th Cir. 1990) ("A vague possibility that loose and sweeping discovery might turn up something . . . does not show particularized need and likely relevance that would require moving discovery beyond the natural focus of the inquiry."); *Evans v. Calise*, No. 92 CIV 8430, 1994 WL 185696 at *1 (S.D.N.Y. 1994) ("The party seeking the discovery must make a prima facie showing, that the discovery sought is more than merely a fishing expedition.").

The Federal Rules vest the courts with broad discretion to tailor discovery narrowly and to dictate its sequence. Fed. R. Civ. P. 26(b)(2); *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). Even if the district court finds that the information sought is relevant, it may deny discovery if disclosure would unduly burden the party from whom discovery is sought. *Micro Motion, Inc. v. Kane Steel, Inc.*, 894 F.2d 1318, 1323 (Fed. Cir. 1990).

Under the Civil Local Rules for the Northern District of California, a party moving to compel discovery must "detail the basis for the party's contention that it is entitled to the requested discovery and must show how the proportionality and other requirements of Fed.R.Civ.P. 26(b)(2) are satisfied." Civil L.R. 37-2. Federal Rule of Civil Procedure 26(b)(2) explicitly provides that a party shall be denied discovery where the scope and magnitude of the discovery sought is clearly unreasonable:

> The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if . . . the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C). Courts routinely limit discovery where the probative value of the information sought is questionable and it would be onerous for the requested party to access and produce the requested information. *See, e.g., In re ATM Fee Antitrust Litig.*, No. C 04-2676,

2007 WL 1827635, *5 (N.D. Cal. Jun. 25, 2007) (denying discovery where "the potential and speculative burden of such materials outweighs the burden of producing them"); *Ricotta v. Allstate Insurance Co.*, 211 F.R.D. 622, 624 (S.D. Cal. 2002) (denying motion to compel production of documents responsive to discovery requests).

IV. ARGUMENT

AOS produced long ago the documents that Fairchild now demands, except for documents that do not exist, are outside of AOS's possession, custody, or control, or would impose a burden (2.6 million pages) far outweighing their relevance. Fairchild's demand for these additional documents, which is inconsistent with the parties' representative parts agreement, should be denied.

A. Fairchild Should Be Ordered To Identify Representative AOS Parts And Its Discovery Requests Should Be Limited To Those Products.

The Court should reject Fairchild's gambit to limit its own production and then renege on its agreement to limit AOS's production. AOS has provided sufficient information for Fairchild to either propose meaningful groupings or identify representative AOS parts. *See* Hebert Decl. ¶¶ 9-12.

In return, AOS agreed to provide sufficient discovery so that Fairchild could identify representative AOS parts that relate to its own infringement theories. Now, having obtained the benefit of limited production for its own products, Fairchild reneges and seeks to compel AOS to produce "*all documents*" relating to "*any aspect* of the process of manufacture" of any AOS product "*at any stage* of its manufacture" or "*any aspect* of [its] structure or design." *See* Fairchild's Mtn, n. 7, 8, 9, 10, 11. In effect, Fairchild demands every technical document in AOS's possession, custody, or control.[7] For the past year, Fairchild has claimed it needed AOS's process flows, GDS files, wafer specifications, and epitaxial specifications to implement its side of the representative parts agreement. AOS has

[6] Fairchild's own identification of "representative parts" has been incomplete and inaccurate. *See, e.g.,* Doscher Decl. Ex. X (08/19/08 Letter from Casto to Jacobs). AOS hopes to resolve its disputes regarding Fairchild's discovery without requiring assistance from the Court.

[7] As AOS's business is as a fabless designer of power MOSFETs, Fairchild demands would compel AOS to produce, essentially, every piece of paper and electronic file in its possession.

produced that information. Nonetheless, Fairchild has continually demanded that AOS provide more and more discovery on more and more products. Now, Fairchild simply moves to compel "all documents" on "all products."

Fairchild argues that its motion does not violate the parties' representative parts agreement because AOS has not identified representative AOS products. *See* Fairchild's Mtn., at 12:7-17. That argument badly mischaracterizes the parties' discussions. Each time Fairchild came calling on AOS for additional information – process flows, GDS files, recipes, etc. – it was on the basis that Fairchild needed the information so it could identify representative AOS parts. Fairchild has no logical basis for asserting that it is still unable to determine groupings or identify representative AOS products that are meaningful in light of its infringement theories.

B. Fairchild's Demand For All Documents Related To All AOS Products Is Cumulative And Facially Overbroad.

In its motion, Fairchild has made no serious effort to tie what it claims it has not received to the specific features recited in its patents. Fairchild fails to carry its burden of demonstrating the discovery it is seeking to compel is relevant and needed by it to litigate its claims. *See Soto*, 162 F.R.D. at 610 (the burden rests on the party seeking to compel discovery to demonstrate that it seeks information relevant to the claim or defense of any party).

Fairchild's demand for *all* documents relating to *all* AOS low voltage MOSFET products is grossly overbroad in light of the very specific patent claims at issue. The Fairchild patents-in-suit do not merely "relate to the manufacturing, structure and operation of power MOSFET devices," as Fairchild contends. Fairchild's Mtn. at 2:23-24. Rather, Fairchild's patents recite very specific features located within discrete regions of the devices for achieving specific results. For example, one key feature claimed by each of Fairchild's Mo patents relates to the depth and doping profile of the heavy body formed in the well, which, according to Fairchild, affects the location of breakdown initiation in the device.[8] *See, e.g.,* Doscher Decl. Ex. Y (06/04/08

[8] Fairchild's expert, Dr. Blanchard, misleadingly portrays the Mo patents as claiming only the steps for manufacturing a power MOSFET, "including the steps of 'providing a semiconductor substrate,' 'forming a plurality of trenches,' 'forming a doped well,' and 'forming a heavy body.' ('195 patent, claim 1)." Blanchard Decl. (D.I. 177, filed 08/12/08) ¶ 9.

Markman Hearing Tr.) at 63:10-12 (Fairchild's counsel: "An ohmic contact, which is normally very shallow, can be deep enough where it does impact where the breakdown occurs. That's the '481 patent."); *Id.* at 51:24-25 (Fairchild's counsel: "Every structure in Claim 29 is directed to the active area of the device"); Ex. Z (U.S. Patent No. 6,828,195) at 8:54-58 (claim 1) (claiming heavy body region with an alleged abrupt junction); Ex. AA (U.S. Patent No. 7,148,111) at 11:6-10 (claim 29) (claiming a method of adjusting the heavy body region). Likewise, one key feature claimed by Fairchild's '947 patent relates to the formation of one trenched structure in the termination region of the device that allegedly combines a gate runner and a field plate. *See, e.g.,* Ex. Y at 68:11-14 (Fairchild's counsel: "Claim 1 of the '947 patent . . . recites, 'a single conductor having first and second conductor portions.'"); *id.* at 75:5-7 (Fairchild's counsel: "And in the '947 patent we are concerned with this area that's circled here, that's alongside the trenched field plate."); Ex. BB (U.S. Patent No. 6,818,947) at 6:30-35(claim 1).

Doscher Decl. Ex. L (AOSN281 process flow at AOS_F00014161); *accord* Hebert Decl. ¶ 9. *See also* Doscher Decl. Ex. J (producing process flows AOS_F00014159-14638 and GDS files AOS_F5000011-24); Ex. K (producing GDS file list AOS_F00014740 and process flows AOS_F00014741-47)

Ex. N (producing GDS files AOS_F5000000-10); Ex. O (producing design layout and mask information AOS_F00014768-9 and GDS files AOS_F5000025-197); Ex. P (producing wafer database AOS_F00015362 and wafer epitaxial specifications AOS_F00015359).

Indeed, Fairchild makes no attempt in its motion to explain *why* the technical documents produced by AOS to date are not sufficient to describe the structure and operation of the accused AOS products in ways meaningful to Fairchild's asserted patents. Fairchild did not do so prior to filing its motion, either. *See* Augustine Decl., Ex. 6 (02/02/08 Email from Jacobs to Schuman) (asserting that Fairchild's infringement analysis requires AOS's process flows, recipes, wafer specifications, and GDS files). In particular, Fairchild does not explain how any of the "recipes" that AOS has purportedly not produced, such as the deposition and etching of the gate polysilicon in the active region of the device,[9] impact any of the key patent claim limitations described above, such as the depth and doping profile of the heavy body, or the formation and function of

[9] As described above, *supra* § II(B), AOS has in fact already produced this information.

structures in the termination region. *See* Fairchild's Mtn at 4, n. 5 ("Fairchild needs . . . polysilicon deposition, polysilicon etching"). Instead, Fairchild merely submits a declaration from its retained expert witness containing vague references to general "structural and operational characteristics" of the accused products. *See* Fairchild's Mtn at 8:8-10, 23-26; 9:4-6; 10:6-7. *See Champion Int'l Corp.*, 907 F.2d at 1084-85 ("loose and sweeping discovery" should be denied); *In re Fontaine*, 402 F. Supp. at 1221 ("the standard of relevancy . . . is not so liberal as to allow a party to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.").

Further, Fairchild's motion should be denied because the burden on AOS of producing the sought-after discovery plainly outweighs any purported benefit to Fairchild from obtaining the information. *See* Fed. R. Civ. P 37(b)(2)(c) (limiting cumulative and unreasonably burdensome discovery). For example, Fairchild now demands over approximately 2.6 million pages of "inline" quality control data, over nine months after it was informed last November, and did not contest, that such information was oppressively voluminous and at best marginally relevant to the parties' discovery requests. *See* Doscher Decl. Ex. T (11/15/07 Letter from A. Wu to I. Shoiket); Ex. U (08/18/2008 Letter from Doscher to Shoiket). (requesting Fairchild explain or withdraw its demand for "inline" quality assurance data). After the November correspondence, Fairchild first specifically identified its purported need for AOS's "inline" quality assurance data on July 11, 2008. Augustine Decl. Ex. 11 at 3.

"Inline" manufacturing quality control data measures the deviations of individual wafers from design specifications during various stages of the manufacturing process. *See* Blanchard Decl. (D.I. 177, filed 08/12/08) ¶ 25 ("'in-line data' refers to quality assurance data . . . to verify that a given lot of devices has been properly manufactured up to that point in the manufacturing process."). On August 28, AOS provided Fairchild with two samples of its quality assurance data, and asked Fairchild to explain how this type of information would be relevant to the case. *See* Doscher Decl. Ex. U. After hours on August 25 (the day before this opposition was due), Fairchild sent a letter agreeing that AOS could withhold documents represented by the samples that AOS provided on August 18, but demanding other quality control data, including data on

trench measurements, field oxide measurements, gate oxide measurements, poly gate measurements, "and other measurements relating to the structure of AOS's accused products." *See* Doscher Decl. Ex. CC (08/25/08 Letter from Hulse to Doscher) at 2. Fairchild's proposal would actually increase significantly the burden on AOS by forcing AOS to review all of the more than approximately 2.6 million pages, and identify the specific pages containing trench, field oxide, gate oxide, poly gate, or vague "other" structural measurements, and produce those specific pages. The burden of this exercise far outweighs the benefit, particularly since AOS has already produced its specifications for the design of the structures, and Fairchild has never contended that deviations, on an individual wafer quality assurance level, are relevant to its infringement theories.

Similarly, while Fairchild admits that it has AOS Design Reviews containing graphical simulations data for accused AOS products, *see* Fairchild's Mtn. at 5, n.6, it now demands all of the raw data files used in conjunction with AOS's simulations software, despite the burden that would place on AOS to produce documents

. Fairchild has not met its burden of showing that the facially overbroad discovery it seeks to compel is not unreasonably cumulative to the production already provided by AOS, much less that any purported relevancy outweighs the burden of production. *See Micro Motion, Inc. v. Kane Steel, Inc.*, 894 F.2d at 1323; *Champion Int'l Corp.*, 907 F.2d at 1084-85; *In re ATM Fee Antitrust Litig.*, 2007 WL 1827635, *5; *Ricotta*, 211 F.R.D. at 624.

V. CONCLUSION

For all of the reasons set forth above, Fairchild's motion to compel should be denied.

Dated: August 26, 2008

MORGAN, LEWIS & BOCKIUS LLP

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